

1 NEDAADOE1

Oral Argument

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JANE DOE 1, Individually and
4 on behalf of all others
similarly situated,

5 Plaintiffs,

6 v.

22 CV 10018 (JSR)

7 DEUTSCHE BANK
8 AKTIENGESELLSCHAFT ET AL.,

9 Defendants.

10 -----x
11 New York, N.Y.
March 13, 2023
4:00 p.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 APPEARANCES

16 BOIES, SCHILLER & FLEXNER LLP
17 Attorneys for Plaintiff Jane Doe
BY: DAVID BOIES
18 SIGRID S. MCCAWLEY

19 ROPES & GRAY LLP
20 Attorneys for Defendant Deutsche Bank
BY: JAMES P. DOWDEN
21 ANDREW TODRES

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1 (Case called)

2 MR. BOEIS: Good afternoon, your Honor.

3 David Boies, of Boies Schiller & Flexner, for
4 plaintiff.

5 THE COURT: Good afternoon.

6 MS. MCCAWLEY: Good afternoon, your Honor.

7 Sigrid McCawley, for of Boies, Schiller & Flexner,
8 also for plaintiff.

9 MR. CASSELL: Paul Cassell, also for plaintiff Jane
10 Doe.

11 MR. EDWARDS: Brad Edwards and Brittany Henderson,
12 from Edwards Pottinger, on behalf of plaintiff.

13 THE COURT: Good afternoon.

14 MR. DOWDEN: Good afternoon, your Honor.

15 James Dowden, from Ropes & Gray, on behalf of Deutsche
16 Bank.

17 MR. TODRES: Good afternoon, your Honor.

18 Andrew Todres, on behalf of Ropes & Gray, for Deutsche
19 Bank.

20 MS. MCCAWLEY: Good afternoon, your Honor.

21 MS. BEBCHICK: Good afternoon, your Honor.

22 Lisa Bebchick, on behalf of defendant.

23 THE COURT: Good afternoon.

24 MS. ELLSWORTH: Good afternoon, your Honor.

25 Felicia Ellsworth, Boyd Johnson and Hillary

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1 Chutter-Ames, on behalf of J.P. Morgan Chase.

2 THE COURT: All right. My understanding is that we
3 took all the money that was needed to pay the hourly rate of
4 all the attorneys on these matters and contributed it instead
5 to Signatory Bank so that bank could emerge from default but
6 maybe that's just a rumor.

7 As I think my law clerk has already mentioned, it
8 seemed to me that we should set some time limits. So, we'll
9 hear first with respect to the motions involving Deutsche Bank
10 and because their docket number is one lower than the other,
11 and 20 minutes for moving counsel, 20 minutes for responding
12 counsel, ten minutes for rebuttal, and then we'll move to J.P.
13 Morgan and since many of the issues overlap, 15 minutes for
14 moving counsel, 15 minutes for answering counsel and seven
15 minutes for rebuttal.

16 I've asked my law clerk to strictly enforce those
17 limits and he's a tough guy. So, just beware.

18 So, let me hear from moving counsel in Deutsche Bank.

19 MR. DOWDEN: Thank you, your Honor.

20 In our papers Deutsche Bank has raised a threshold
21 question that applies to the claims brought against it. And
22 that threshold question is the question of a release. Just two
23 months prior to instituting this action, plaintiff signed a
24 release. In exchange for that, releasee received a substantial
25 monetary payment. And corollary to that executed a very broad

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1 release with the Epstein estate.

2 Your Honor turns to Exhibit A to our brief, a copy of
3 that release -- and I have a copy for the Court.

4 THE COURT: Yes. Hand it up. I left my papers
5 upstairs.

6 MR. DOWDEN: May I approach?

7 THE COURT: Yes.

8 (Pause)

9 MR. DOWDEN: Your Honor, as shown in Exhibit A, that
10 release was exceedingly broad. I called the Court's
11 attention --

12 THE COURT: Well, so you're not a party to this
13 agreement, are you?

14 MR. DOWDEN: No, your Honor. However --

15 THE COURT: And since when under applicable law does a
16 release between two parties extend to possible claims against
17 third parties?

18 MR. DOWDEN: Your Honor, when the face of the release
19 is clear that it applies to third party beneficiaries --

20 THE COURT: Where do you say that?

21 MR. DOWDEN: I'll point to two particular paragraphs
22 in this agreement. In the now therefore agreement, halfway
23 through it talks about Jeffrey Epstein, his coexecutors,
24 coestate holders, directors, officers and go a little farther
25 down and it says "any entities or individuals who are or have

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1 ever been engaged by whether as independent contractors or
2 otherwise, employed by or worked in any capacity for Jeffrey
3 Epstein and/or the Epstein estate". And that is defined as a
4 release.

5 Your Honor, it is clear from the plain language of
6 that test that Deutsche Bank fits within that broad release.
7 I'll start with the first applicable section. It first applies
8 to any entity engaged by the Epstein estate, engaged by, your
9 Honor, in ordinary common parlance under dictionary definition
10 means to begin services for, to attain the services. And in
11 fact courts in this jurisdiction have recognized that reviewing
12 banking services can fall within the term "engaged". In
13 particular, I am recalling the Parundy decision of J.P. Morgan.

14 Your Honor, if we just look at the allegations --

15 THE COURT: Well, looking at the sentence you're
16 referring to -- which only a lawyer could have drafted since it
17 goes on even longer than a Falkner page -- now, therefore,
18 claimant for and on behalf of herself and her lawyers, devisees
19 legalities, distributees, executors, administrators, trustees,
20 personal representatives, successors and assigns, for and in
21 consideration of the settlement amount, the adequacies and
22 sufficiencies of which are hereby acknowledged, hereby releases
23 and forever discharges the coexecutors of the estate of Jeffrey
24 E. Epstein in both their capacity as coexecutors and
25 individually, the cotrustees of the 1953 trust, the Epstein

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1 estate, any entity owned or controlled in whole or in part by
2 Jeffrey Epstein or the the -- typo there on the part of the
3 brilliant draftsman of this, the word the appears twice -- or
4 the the Epstein estate (the Epstein entities) and their
5 respective current and former principals, officers, directors,
6 stockholders, managers, members, partners, limited partners,
7 trustees, beneficiaries, administrators, agents, employees,
8 attorneys -- I am good there are attorneys in there --
9 predecessors, successors, assigns and affiliates. And if we
10 stopped the music just there -- we're only a third through this
11 wonderful sentence -- that would not excuse you at all, right?

12 MR. DOWDEN: No, your Honor.

13 THE COURT: Okay. So, we go on.

14 And any entities or individuals who are or have ever
15 been engaged by (whether it's as independent contractors or
16 otherwise) employed by or worked in any capacity for Jeffrey E.
17 Epstein and are the Epstein estate jointly and severally the
18 releasees.

19 So, of those terms we're still only two thirds through
20 the sentence, but who's counting? Which do you say applies to
21 Deutsche Bank?

22 MR. DOWDEN: Your Honor, I'll point to three
23 exemplars. One, any entity obviously engaged by, employed by,
24 worked in any capacity.

25 Those are the three I focus on.

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1 THE COURT: So, is it unambiguous that that applies to
2 third parties? For example, would it apply to a restaurant
3 where Mr. Epstein had a dinner or two?

4 MR. DOWDEN: Your Honor, I would say, as Judge Kaplan
5 recognized in the Prince Andrew case, when a substantial
6 settlement amount such as this is entered into, there is a
7 corollary broad expectation for the breadth of that release so
8 as to bring finality to the case to avoid being brought into
9 future litigation and future claims.

10 So, your Honor, given that, yes, the parties' intent
11 here was clear from the plain language to be broad. Anyone who
12 worked for, employed by, engaged by the estate, that would,
13 your Honor, apply to a catering service that works at an event
14 at Jeffrey Epstein's house.

15 THE COURT: Okay. I'm thinking, he goes into CVS and
16 buys some very upscale hair tonic. And you say that putting
17 aside the unlikelihood he would have a claim, but assuming for
18 one reason or another he had a claim that CVS would be offer
19 the hook because of his --

20 MR. DOWDEN: Yes, your Honor, it would.

21 THE COURT: So, in other words, no one would be off
22 the hook?

23 MR. DOWDEN: That's actually not true your Honor. In
24 fact, later on in the release there's a specific set of
25 individuals who are carved out specifically from this

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1 otherwise --

2 THE COURT: Well, that's an important point. I want
3 to get to that in a minute and I'm still on your -- let's just
4 finish this sentence because I don't want to leave the sentence
5 hanging.

6 "From any and all claims demands, actions, causes of
7 actions, suits, debts, dues, sums of money, accounts,
8 variances, trespasses, damages and judgments, whether sounding
9 in equity, tort, common law, contract statute, regulation or
10 otherwise, and whether now existing, hereafter existing or
11 revived in the future, whatsoever, in law, admiralty, equity or
12 otherwise, including without limitation and any and all claims
13 or causes of action that arise or may arise from or which
14 otherwise concerns acts of sexual abuse or sex trafficking by
15 Mr. Epstein (the claims), which against the releasees claimant
16 ever had, now has or hereafter can, shall, or may have, for a
17 time or by reason of any manner, clause or thing, whatsoever,
18 from the beginning of the world through the date of the general
19 release and settlement agreement."

20 Boy, you know, a legal education is a wonderful thing.

21 MR. DOWDEN: Your Honor, counsel sitting at the table
22 in front of us actually entered into this settlement agreement.
23 So, they're well aware of the terms of this agreement and the
24 breadth of this agreement.

25 THE COURT: Well, let's talk, which I frankly may be

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1 more nicely pertinent to what you were about to turn to, which
2 is on page 2.

3 I'm sorry.

4 MR. DOWDEN: The carve out, your Honor, is on page
5 three.

6 THE COURT: Three, yes. I'm sorry.

7 MR. DOWDEN: It would be the paragraph that begins
8 "while the parties".

9 THE COURT: Thank you very much.

10 "While the parties do not believe there is any
11 reasonable interpretation that this general release could be
12 construed to release Jane's Jess Staley Leon Black or their
13 respective entity affiliations. For clarity, this general
14 release and settlement agreement specifically does not include
15 Jess Staley Leon Black or any company or entity which either is
16 or was beneficially owned or controlled by Jess Staley or Leon
17 Black as a releasee or release party under this general release
18 and settlement agreement."

19 Now, the first part of that sentence is that "The
20 parties, both sides do not believe there is any reasonable
21 interpretation that this general release could be construed to
22 release James Staley Leon Black or their respective entity
23 affiliations".

24 So, aren't the parties jointly saying that if I
25 construe this agreement the way you would like me to construe

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1 it, they agree that would be an unreasonable interpretation?

2 MR. DOWDEN: Your Honor, two things. First, those two
3 individuals there are close friends and associates of
4 Mr. Epstein. They're not to have alleged to have engaged in,
5 worked for or otherwise been limited by Mr. Epstein. But
6 rather, two specific individuals who are friends or associates
7 that were carved out from the otherwise very broadly --

8 THE COURT: But it applies to their affiliated
9 entities?

10 MR. DOWDEN: To the sense that they are owned or
11 controlled those affiliated entities.

12 THE COURT: Where does it say that? It just says --

13 MR. DOWDEN: "Beneficially owned or controlled by",
14 your Honor.

15 THE COURT: I'm sorry. No, no, no. That's the second
16 sentence. I'm still on the first sentence. The parties do not
17 believe there is any reasonable interpretation that this
18 general release could be construed to release James Staley Leon
19 Black or their respective entity affiliations, which in the
20 case of Mr. Staley is your co-defendant, yes?

21 MR. DOWDEN: Yes, your Honor, which envisioned --

22 THE COURT: Do you interpret that provision as -- let
23 me ask two questions. First, do you interpret that provision
24 as barring any claim by plaintiffs that, against Mr. Staley's
25 affiliate?

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1 MR. DOWDEN: Your Honor, I would say two things. One,
2 there may be some debatability around that point, given the
3 subsequent language which talks about owned or beneficial owner
4 or control.

5 THE COURT: Well, the second sentence, the one I'm
6 referring to says, all parties expressly acknowledge, agree and
7 understand -- I hope some day someone will tell me what the
8 difference is between those three items. But anyway, all
9 parties expressly acknowledge, agree and understand that any
10 and all claims that claimants has or may have against Jess
11 Staley Leon Black or any company or entity beneficially owned
12 or controlled by Jess Staley or Leon Black are expressly
13 preserved. Doesn't that create an ambiguity with respect to
14 the language I just read from the first sentence?

15 MR. DOWDEN: With respect, perhaps, your Honor, to the
16 entity owned or controlled by Jess Staley or Leon Black, not
17 for Deutsche Bank, your Honor. Because if the intent of
18 parties was to carve out individuals or their affiliates, the
19 parties could have and should have carved out Deutsche Bank as
20 reserved -- instead, this carve out is exceedingly narrow from
21 the otherwise very, very broadly drafted broad release.

22 And, your Honor, in the paragraph right before the one
23 you were reading, it is contemplated that this release may be
24 used by third party beneficiaries. So, if you look at the last
25 sentence of the paragraph beginning "neither", however, this

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1 general release and settlement agreement may be introduced in
2 any proceeding concerning or arising from, including as
3 evidence of liability or wrongdoing and on the part of the
4 party, as well as breached the terms hereof.

5 THE COURT: Okay. Because I have had to limit
6 everyone's time, although, you're all getting about twice the
7 time you would get in the Second Circuit because they're so
8 much smarter than this Court, let me just shift gears for a
9 second to one other question I had growing out of your papers.

10 When you argue that Deutsche Bank did not participate
11 in Mr. Epstein's sex trafficking venture, you say in effect
12 that it merely provides usual services. But doesn't the
13 compliant allege that Deutsche Bank differentiated its services
14 for Mr. Epstein by, for example, assisting him in structuring
15 his cash withdrawal so as to evade alerts by failing to
16 implement guidance recommended by its reputational risk
17 committee, et cetera?

18 So, isn't there enough in the complaint, take it as I
19 must, most favorably to the plaintiff, to suggest that he was
20 treated differently and this wasn't usual services and that it
21 wasn't usual services because they had reason to believe that
22 he was engaged in the --

23 MR. DOWDEN: Your Honor, let me start by -- courts
24 have been very clear in interpreting the participation
25 requirement of the TVPA, that it is not limited. However, your

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1 Honor, it has to have in some sort of active step, some
2 concrete step. A mere passive facilitation is not enough.
3 Cases have even held providing the tools that allow the venture
4 to continue are not enough.

5 Here, as alleged in the complaint --

6 THE COURT: What case that's -- on me, says that?

7 MR. DOWDEN: Your Honor, there are two cases I call
8 your attention to, Choice Hotels, which was decided by Judge
9 Kogan in the Eastern District of New York.

10 THE COURT: It's the Eastern District.

11 MR. DOWDEN: Persuasive authority, actually.

12 THE COURT: Of course, I always paid as close as
13 attention to my brilliant colleagues in the Eastern District.
14 That goes without saying, but I don't think it's binding on me.

15 MR. DOWDEN: Yes, your Honor, Noble decided by this
16 court by Judge Sweet in the Southern District --

17 THE COURT: That's one of the greatest judges ever to
18 serve on this court. So, that give me a little more pause.

19 MR. DOWDEN: Your Honor, in Noble, dealing with the
20 Weinstein case, there was an allegation that Mr. Weinstein's
21 brother actively participated in Mr. Weinstein's conduct. And
22 the specific facts that were alleged there were that he
23 assisted in arranging travel and actually, paid out settlement
24 money. The Court found that that was not enough, your Honor.
25 And that's because the Paradime case and TVPA requires more.

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1 It requires that, Southern District decided in the Canosa case,
2 the Canosa case is yet another case involving Weinstein
3 employees who actively engaged in providing sex paraphernalia
4 coverups and otherwise. Those are the Paradime participation
5 cases. Even, your Honor, in the Second Circuit, the Perlis
6 case, a head of school who traveled to a foreign country and
7 didn't stop what was going on, was enough.

8 Your Honor, that's why the Paradime cases under the
9 TVPA for participation are hotel cases. Hotels that sort of
10 allow this to continue observe sex trafficking happen, those
11 are the Paradime cases. Extending it to a banking institution
12 is a lot farther than --

13 THE COURT: All right. Unfortunately, we've more than
14 gone the 20 minutes. So, you'll have rebuttal for a few
15 minutes.

16 So let's hear from your adversary.

17 MS. MCCAWLEY: Sigrid McCawley, on behalf of the Does,
18 your Honor.

19 THE COURT: So, what about the settlement agreement
20 and what about in particular, the parties went to some length
21 to carve out from what otherwise appears to be a very broad
22 settlement, claims against other persons and entities but not
23 Deutsche Bank. So, why isn't that reasonable inference, maybe
24 a binding inference that this doesn't apply or that this
25 agreement let's Deutsche Bank off the hook?

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1 MS. MCCAWLEY: Well, your Honor was correct when you
2 talked about the language in the agreement and how it wouldn't
3 cover a situation like. This is a financial institution. That
4 simply wasn't contemplated by the parties. You can tell that
5 from the plain language of the agreement.

6 And the provision that you talk about in the back,
7 your Honor, where it says starts with the language "while the
8 parties do not believe there is any reasonable interpretation",
9 that means they didn't contemplate any reasonable
10 interpretation that these individuals or financial institutions
11 that were related with would be covered by this release.

12 So, that is the death knell for them because that is
13 the language that makes it very, very clear --

14 THE COURT: Why didn't the agreement end there of this
15 sentence end there? In other words, if that sentence means
16 everything you say it means, then you didn't need the rest of
17 the sentence.

18 MS. MCCAWLEY: Your Honor, I think that for the rest
19 of the sentence they are just trying to further elaborate on
20 what they were concerned with with respect to those two
21 individuals, but the focus here is not on the individuals but
22 the entities. So, when you look at the beginning os the -- and
23 we talked about what the parties were focused on, you'll
24 remember from our complaint that Epstein holds a lot of
25 different companies. The bank alone opened a number of

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1 accounts. He had many holding companies, many things that his
2 estate concerned with protecting. So, that's what the focus
3 was on. It wasn't focused on things like separate financial
4 institutions and protecting that financial institution. It was
5 focused on protecting the employees of the household for
6 example, like the -- these kinds of individuals. It wasn't
7 focused on the large financial institutions who were
8 independent. And what guides, your Honor, in that
9 understanding is the nondisclosure agreement.

10 THE COURT: Well -- Go ahead.

11 MS. MCCAWLEY: So, your Honor was talking earlier
12 about the case law. And of course, opposing counsel mentioned
13 the Prince Andrew case which we were counsel on. And in that
14 case the Court focused on the fact that the agreement contained
15 a similar to here, a nondisclosure provision and that's because
16 the case law as you talked about in New York, you have to
17 establish that you are an intended third-party beneficiary to
18 the agreement. When there is a nondisclosure provision in the
19 agreement, very strong here, Deutsche Bank didn't even know
20 about this agreement until they got into this case.

21 In other words, there was no intention of Epstein or
22 Jane Doe to protect the financial institution with respect to
23 this.

24 THE COURT: I'm not sure -- helps me out. So, in my
25 hypothetical say this agreement does not any away, shape or

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1 form preclude me from suing CVS -- I apologize to CVS for using
2 them as a hypo. Next time it'll be Walgreen's. That means
3 that even though I've said in the agreement that we will not
4 sue CVS, but I can still sue CVS?

5 MS. MCCAWLEY: Well, no, your Honor. But when you
6 talk about what the Court looks at when they're analyzing an
7 agreement like, the nondisclosure does weigh on that, what the
8 parties' intent was. So, in this instance when there are broad
9 terms as there are in this agreement and there's no reference
10 to a financial institution and there's a nondisclosure
11 provision like this, as Judge Kaplan says in the Dufrey that
12 leans in favor when you're looking at it from the perspective
13 of whether it is unambiguous or ambiguous, that leans in lever
14 of the nondisclosure being that they didn't intend to cover
15 that beneficiary. It didn't intend to cover a financial
16 institution.

17 THE COURT: So, for the sake of argument, if I were to
18 decide that in the relevant respects, this agreement is
19 ambiguous, then I would have to hear extrinsic evidence from
20 the negotiations or whatever as to what the intent of the
21 parties was, right?

22 MS. MCCAWLEY: That's correct, your Honor.

23 THE COURT: You were one of the parties, one of the
24 lawyers who negotiated this, right.

25 MS. MCCAWLEY: I was not, your Honor.

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1 THE COURT: Okay. What evidence of that sort, if any,
2 do you think would be relevant?

3 MR. DOWDEN: I'll start with the point that we made in
4 our brief we think the language is clear --

5 THE COURT: I understand. But it's a classic
6 contractual dispute because each side says the language is
7 absolutely crystal clear no reasonable person could possibly
8 think otherwise, they totally disagree. But assuming that in
9 my confusion I decide that there might be some ambiguity, what
10 kind of evidence should I look to?

11 MS. MCCAWLEY: There could be evidence entered as to
12 who they intended to cover. And certainly the Epstein estate
13 was a party to this agreement. And I think the fact that they
14 were obviously at Epstein's bank regularly with those banking
15 financial institutions was the intended cover that they would
16 have made that clear in this agreement and they didn't.

17 So, we do believe that the agreement was very clear on
18 the face of it. But to the extent you were to consider
19 extrinsic evidence, it would be those types of things to get at
20 what the parties did intend with the language that they chose.

21 THE COURT: Lets go back to the first page, the end of
22 the sentence that we mentioned before. Any entities or
23 individuals who are or have ever been engaged by (whether as
24 independent contractors or otherwise, employed by, or worked in
25 any capacity for Jeffrey E. Epstein and or the Epstein estate),

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1 why isn't Deutsche Bank an entity that was engaged by and
2 worked in some capacity for Mr. Epstein?

3 MS. MCCAWLEY: As your Honor noted before, that would
4 be too broad. And it's also very clear from the language, the
5 limiting language in the Wile paragraph in the back that they
6 didn't intend to cover financial institutions. So entities was
7 not intended to have that breadth. And it's also tide to the
8 language that your Honor read in the beginning where the focus
9 is really on the clear language deals with the coexecutors of
10 the estate, both in their capacity as coexecutors, individually
11 and cotrustees of the 1953 trust, the Epstein estate and any
12 entities owned or controlled in whole or in part by Jeffrey
13 Epstein or the Epstein estate. They were looking at protecting
14 that inner circle, your Honor. They were making sure that
15 Epstein wasn't getting dragged in for those types of holding
16 companies and things that were within the inner circle of the
17 Epstein entity. They were not looking to protect outside third
18 parties of that nature. Certainly, not a financial institution
19 of the size and depth of J.P. Morgan and Deutsche Bank or any
20 significant financial institution.

21 And certainly, if they did intend that, your Honor,
22 then this is a very long sentence. They have plenty of room to
23 write that in and they didn't choose to.

24 THE COURT: So, you cannot imagine how disappointed I
25 was that this sentence wasn't even longer.

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1 So, let me turn to some other issues in the case just
2 because, again, we have limited time.

3 (Continued on next page)

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1 THE COURT: So with your claim for intentional
2 infliction of emotional distress.

3 MS. MCCAWLEY: Yes, your Honor.

4 THE COURT: There's a case from the appellate division
5 *Shea v. Cornell University*, which holds that substantial
6 assistance requires, quote, intentional or deliberate acts
7 directed at causing harm, which would rise to the level of
8 actionable conduct in relation to the subject assault or,
9 quote, overt encouragement of the offensive behavior. How do
10 you meet either of those prongs?

11 MS. MCCAWLEY: Well, your Honor, there's a plethora of
12 allegations, there are a plethora of allegations in our
13 complaint that hit this issue specifically. What we have
14 focused on is the conduct of the banks and how extreme and
15 outrageous and continuous that conduct was to help facilitate
16 the trafficking.

17 So, for example, opening over 40 accounts, having one
18 attorney make 97 cash withdrawals in a very short time period,
19 all within the range of \$7,500 to effectuate the structuring,
20 and no red flags. Even when they call into the bank to report
21 that, nothing is done. There's just a repeat of over and over
22 red flags within the bank that we've enunciated in our
23 complaint, and nothing is done. So over 200,000 --

24 THE COURT: So I guess the question I'm raising is,
25 given that language in the appellate division -- this

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1 particular claim is a state law claim -- what you are
2 describing are many acts of facilitation, if you will. But
3 that's a little bit different, is it not, from either overt
4 encouragement or intentional or deliberate acts directed at
5 causing harm, which would rise to the level of actionable
6 conduct in relation to the assault. Let me start with the
7 latter.

8 Is there any evidence of overt encouragement of the
9 assaults?

10 MS. MCCAWLEY: Yes, your Honor.

11 So in the complaint, for example, we allege that
12 Packard and Morris actually went to Jeffrey Epstein's home and
13 witnessed the trafficking. These are high level individuals
14 within the bank who are supposed to be protecting these people,
15 and instead are witnessing the trafficking and they're helping
16 facilitate it and are actively participating in it. So those
17 are the types of allegations. While it's a little bit
18 different, your Honor, I understand the struggle here on the
19 intentional infliction of emotional distress count. What the
20 case law says, like *Canosa v. Ziff* and also this came up again
21 in the Prince Andrew/Giuffre case, it's that continuous,
22 extreme, outrageous conduct, the continuous, severe conduct
23 that comes up in this conduct, we have it here. Because
24 without the bank providing loads and loads of cash, Jeffrey
25 Epstein cannot commit the crimes he committed, right. He had

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1 to have a facility that was willing to disregard laws, look the
2 other way, not pay attention to these things, not bring them to
3 the authorities, right, in order for the trafficking to be
4 facilitated. So yes, they are working hand in hand with him.
5 Without the bank --

6 THE COURT: I guess my last question -- then I want to
7 move to something else before we lose the remaining time -- so
8 it's one thing to say they gave him lots of money and
9 disregarded the rules relating to that and all like that, and
10 so they must have known that something fishy was going on. But
11 at least one reading of this *Shea* case would be they have to
12 know, for this particular tort, they have to know more than
13 that; they have to actually say, use this money and go out and
14 commit an intentional infliction of harm.

15 MS. MCCAWLEY: And that's what we've alleged, your
16 Honor. I mean, they were incentivized to help Epstein because
17 they got lucrative, lucrative accounts as a result, right.
18 They got Epstein, all of his friends, coming in, putting their
19 money into the bank. So this was a quid pro quo. They were
20 very, very successful in what they were doing. They were
21 helping facilitate the trafficking, because why; they got huge
22 benefits from it.

23 There's emails that we have alleged in the complaint,
24 2 to \$4 million in a year, 3 to \$4 million in accounts coming
25 in. The bank was very, very incentivized to make sure that

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1 this trafficking continued and they kept Epstein happy because
2 they could those accounts. So we do allege there was active
3 participation in the trafficking in the complaint.

4 THE COURT: How much time do we have? We've got five
5 minutes. We've got time for more than one question.

6 So for your claim of aiding and abetting the TVPA,
7 doesn't the *Rothstein* case kind of preclude that and, more
8 generally, isn't the civil cause of action limited to, quote,
9 this chapter, which would not pick up Section 2 of Title 18?

10 MS. MCCAWLEY: Your Honor, the case didn't address the
11 argument that we've put forward in our allegations, which is --
12 in our briefs -- which is the textual argument. So it's really
13 not in contrast, because that argument wasn't made.

14 So what we're saying is that, under the language, just
15 the plain language of 18 USC Chapter 2, aiding and abetting of
16 the TVPA is not precluded. And you'll remember, your Honor, in
17 the cases like *A.B. v. Marriott*, they talk about the broad
18 remedial purpose of the statute.

19 And so what we're saying here is, under the text of
20 the statute --

21 THE COURT: This is --

22 MS. MCCAWLEY: Sorry.

23 THE COURT: -- a hybrid statute, civil and criminal.

24 MS. MCCAWLEY: Correct, your Honor.

25 THE COURT: So for every argument that it should be

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1 broadly construed, there could be an argument that it should be
2 narrowly construed because it's both civil and criminal, but
3 it's one statute.

4 MS. MCCAWLEY: I understand, your Honor. I think that
5 what we have seen in the case law is the focus on it being a
6 remedial statute that is supposed to be broadly construed. But
7 nevertheless, even if you set that aside --

8 THE COURT: I hear that. Let me just pull out the
9 relevant section. So this is Section 1595, yes.

10 MS. MCCAWLEY: Correct.

11 THE COURT: Quote, an individual who is a victim of a
12 violation of this chapter may bring a civil action against the
13 perpetrator or whoever knowingly benefits financially or by
14 receiving anything of value from participation in a venture
15 which that person knew or should have known has engaged in an
16 act in violation of this chapter, an appropriate district court
17 of the United States may recover damages and attorneys' fees.

18 Now, there are two things about that. First, it's
19 limited to someone who is a victim of a violation of this
20 chapter. So this chapter doesn't include Section 2, does it?

21 MS. MCCAWLEY: Well, your Honor, we contend that
22 18 U.S.C. Section 2 makes an aider and abetter punishable as a
23 principal, and that means if they're a principal, they're a
24 principal punishable under Chapter 77.

25 THE COURT: That may be true as to the criminal

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provisions, but here we're talking about the civil remedy. And the civil remedy speaks of this chapter, rather than the entirety of the federal criminal code. So I'm wondering if that's a problem for you. And then the other bit, which I just alluded to before, it only can be brought by an individual who is a victim of a violation and against the perpetrator, et cetera.

Don't those terms have to be interpreted the same as they would be under the criminal provisions? They're directly referencing the criminal provisions. And isn't the rule of construction that criminal provisions should be narrowly construed?

MS. MCCAWLEY: It's a fair point, your Honor. I would just point to the fact that it's really a textual argument. I understand that your Honor may have a different interpretation of the plain language, and we certainly accept that. But we do believe that the point of the Trafficking Victims Protection Act was to provide broad protection of victims.

THE COURT: Let me take the liberty of interrupting you because, once again, we have exceeded the time.

MS. MCCAWLEY: Thank you, your Honor.

THE COURT: And let me hear a rebuttal from moving counsel.

MR. DOWDEN: Thank you, your Honor.

Before I begin, I just have one very significant

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1 factual correction to make from the last presentation. There
2 is no allegation in the complaint that anyone at Deutsche Bank
3 saw sex trafficking victims. There is one allegation that is
4 conclusory and hypothetical that it suggests at one meeting a
5 sex trafficking victim was observable. That's not a fact, your
6 Honor; that is a conclusory hypothetical found at
7 paragraph 236. That is as far as the complaint on its face can
8 go on that point.

9 THE COURT: Well, let's assume that the complaint
10 alleges enough to suggest that the bank was doing things that
11 were different for Mr. Epstein than for most people and may be
12 in violation of its own internal, normal practices and rules.
13 And they knew, did they not, that he had been convicted of
14 trying to lure an underage person into prostitution or
15 something like that -- I can't remember the precise
16 allegation -- so it wasn't that they were totally ignorant of a
17 practice in which he may have engaged?

18 MR. DOWDEN: Your Honor, what the complaint pleads is
19 that Deutsche Bank was aware that, seven years prior,
20 Mr. Epstein was convicted of solicitation of a minor, was
21 sentenced, imprisoned and paid settlements. That does not mean
22 that seven years later the bank knew that he was engaged in sex
23 trafficking.

24 THE COURT: Well, I understand that as a general
25 proposition, but I'm glomming together, assuming that he seems

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1 to be seeking to get cash directly through a lawyer and so
2 forth in ways that are suspicious, and you know that he's done
3 this before, indeed was found guilty and it was sufficiently
4 serious; no one thought it was an accidental matter that could
5 lead to probation or anything like that. He got serious time.
6 Why wasn't that a red flag flying, as they say?

7 MR. DOWDEN: Your Honor, a couple things I would say.
8 That separate sort of AML type conduct was the subject of other
9 litigation, a subject of a DFS penalty that Deutsche Bank has
10 already paid. It does not give a basis for a private cause of
11 action for sex trafficking.

12 As *Choice Hotels* says, failing to adequately detect
13 signs of sex trafficking and potentially violation of other
14 statutes does not give rise to liability under the statute.

15 One other point, your Honor, I want --

16 THE COURT: What case were you referring to?

17 MR. DOWDEN: That was *Choice Hotels*, your Honor, that
18 was Justice Hogan, again.

19 One other thing I want to make clear, in the release
20 in the Giuffre/Prince Andrew case, there was a specific carve
21 out for third-party beneficiaries. The agreement said, there
22 is no third-party beneficiaries here. That is not present in
23 the carve out in this release. And it intended the release to
24 carve out broad swaths of institutions engaged by or worked by
25 that should have been in the release. Plaintiffs can't have

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1 their cake and eat it too.

2 THE COURT: I wish I had said that.

3 MR. DOWDEN: Your Honor, in the complaint, there is
4 very specific allegations of engagement, of sort of providing
5 services, providing investment in long-term securities, wires.
6 Your Honor, that's engaged, that's work, that's the plain
7 language of the unambiguous release, not carved out to
8 third-party beneficiaries.

9 THE COURT: Let me ask the question I asked your
10 adversary. If I were to find this agreement ambiguous -- I
11 know you think it's not -- but if I were to find it ambiguous,
12 what kind of extrinsic evidence should I be looking at?

13 MR. DOWDEN: Your Honor, for example, there are public
14 statements, including in filings, where the plaintiffs have
15 said, counsel has said, other third parties were intended to be
16 released by these releases. Ms. Maxwell, for example, was
17 intended to be released in these purposefully because the
18 Epstein estate was looking for finality. In exchange for a
19 substantial payment, a broad release was executed. There are
20 good policy reasons for that, and that was recognized, again,
21 by Judge Kaplan in the Giuffre case.

22 THE COURT: Did you want to respond to anything on the
23 aiding and abetting or any of that stuff?

24 MR. DOWDEN: No, your Honor. I think the law --

25 THE COURT: Very good. Thank you so much.

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1 Let's turn to JPMorgan. Let me hear from moving
2 counsel.

3 MS. ELLSWORTH: Thank you, your Honor. Felicia
4 Ellsworth for JPMorgan.

5 With the privilege of going second, let me jump into
6 the questions that you asked counsel in the first argument.
7 The allegations of the complaint against JPMorgan contain no
8 nonconclusory allegations of any activity by JPMorgan that was
9 anything other than routine banking activity. And the courts
10 in the Second Circuit and New York are clear that routine
11 banking activity, provision of routine banking activity does
12 not give rise to any sort of duty, doesn't give rise to a
13 negligence claim, and also doesn't give rise to any liability
14 for any use that might be made of the funds that is illicit,
15 even if --

16 THE COURT: So what about the situation, if what is
17 otherwise a routine transaction is one, in my hypothetical,
18 that the bank knows is being used for an illegal purpose,
19 doesn't that change the situation?

20 MS. ELLSWORTH: So first of all, there's no
21 allegations like that in the complaint. But second, to answer
22 your question --

23 THE COURT: I will see about that, but go ahead.

24 MS. ELLSWORTH: To answer your question, if it were
25 pled adequately and in a nonconclusory fashion that there was

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1 actual knowledge that the bank would use the funds -- excuse
2 me -- that the customer might use the funds for illicit ends,
3 then perhaps there could be some liability.

4 But even in the terrorism context, in cases like the
5 *Lerner* case, this court's case in *Rothstein*, there are similar
6 allegations about suspicions for what the funds might be going
7 towards, knowledge of public information similar to what's
8 being alleged in the complaint here, and that's been held to be
9 insufficient.

10 THE COURT: Let's assume arguendo that Mr. Staley knew
11 that the bank was being used to facilitate Mr. Epstein's
12 trafficking, his improper activity, isn't that knowledge
13 imputed to the bank?

14 MS. ELLSWORTH: So the allegations of the complaint
15 and the allegations of the third-party complaint are that, to
16 the extent that Mr. Staley had knowledge, that knowledge was of
17 sexual misconduct and not of trafficking. As your Honor is
18 well aware, the statute has very specific requirements,
19 trafficking is a legal definition, and it requires commercial
20 sex obtained by force, fraud or coercion. There are no
21 allegations in the complaint that Mr. Staley had any knowledge
22 as to, number one, any corrupt sex acts or, number two, force,
23 fraud or coercion.

24 THE COURT: Assuming all that for the moment, you're
25 not contesting, though, are you, that whatever knowledge he did

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1 have is imputed to the bank?

2 MS. ELLSWORTH: No, I am contesting that, your Honor.

3 Particularly because --

4 THE COURT: Why?

5 MS. ELLSWORTH: -- the knowledge would have been
6 obtained in the course of committing an alleged crime, as is
7 outlined in our third-party complaint. Case law is clear that
8 that would be outside the scope of his employment, to be sure,
9 it is contrary to the interest of JPMorgan, obviously, and
10 would serve only Mr. Staley's personal interests, which would
11 mean that it's not within the scope of his employment and it
12 should not be imputed to JPMorgan because it is contrary to
13 JPMorgan's own interest. But even if -- we do contest
14 imputation -- but even assuming that that knowledge is imputed
15 to JPMorgan, it's still insufficient to show a violation under
16 the TVPA.

17 THE COURT: So again, maybe I'm not fully capturing
18 your argument, the complaint, I think, if I recall, alleges
19 that JPMorgan provided services for Jeffrey Epstein that were
20 special, for lack of a better word, structuring his cash
21 withdrawals so as to avoid or evade alerts, delaying filing of
22 suspicious activity reports, et cetera.

23 So why isn't that enough to take this case out of the
24 case law regarding the usual services?

25 MS. ELLSWORTH: I'll say a couple things in response.

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I think your Honor has correctly identified what the complaint has attempted to plead, in terms of what makes the activity, the bank activity unusual. The suggestion that structuring transactions were ignored or not reported, the suggestion that suspicious activity reports should have been filed -- of course, the evidence has not yet come in on whether or not they were -- and then there's a suggestion that --

THE COURT: Yes, but of course -- and you all know this, but I'll state it for the record -- on these motions, I have to take every well pleaded allegation most favorably to the plaintiff.

MS. ELLSWORTH: Agreed. And I don't think those allegations are sufficient to take this outside of the routine banking activity paradigm. He was allowed to withdraw his own money, and it was allowed to be used. To the extent that there are claims, as Mr. Dowden suggests, that money laundering rules were not sufficiently followed, that is not a basis for some private liability under the TVPA.

And let me just move to the sort of three things that plaintiff needs to demonstrate under the TVPA; they need to show knowledge, participation and benefit. I would note, at the outset, that the plaintiff in the JPMorgan case, the allegations are outside of the ten-year statute of limitations for the TVPA, because the banking relationship with JPMorgan actually ended in 2013. There are no allegations in the

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1 complaint about a specific act involving plaintiffs after
2 November 24th, 2012, which would be required to bring it inside
3 the statute of limitations. But putting aside that, we talk
4 about knowledge already and the imputation of Mr. Staley's
5 knowledge. Even if we assume that his knowledge is imputed to
6 JPMorgan, there are no allegations that he was aware of
7 trafficking. But again, putting that to the side, there is
8 insufficient allegations of participation and benefit, which
9 are two additional requirements of the statute.

10 As to participation, the three SDNY cases that have
11 addressed the TVPA; *Canosa, Geist and Noble*, in *Geist* and
12 *Noble*, as Mr. Dowden was indicating, in both of those cases,
13 the allegations were that the defendant had made what are
14 called hush payments to victims of Harvey Weinstein. Those
15 were decisions by Judge Sweet and Judge Hellerstein to show
16 participation. The *Canosa* case has very, very different
17 allegations, I won't go through them again -- I'm sure your
18 Honor is familiar with it -- but they involve direct assistance
19 with the actual sexual misconduct. We don't have any
20 allegations like that in this case.

21 And then moving to benefit, in the *Geist* case, the
22 benefit there was alleged to be that the Weinstein companies
23 were allowed to continue to employ Harvey Weinstein. That was
24 found also to be insufficient to show benefit from knowing
25 participation in a venture, which is what's required under the

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1 TVPA. So none of that is pled. This case is much more similar
2 to *Noble* and *Geist* than it is to *Canosa* to be sure.

3 THE COURT: I understand the argument from the first
4 part. On benefit, maybe I'm missing your point.

5 So assuming -- which I know you contest -- but
6 assuming that they knew what was going on, then there was an
7 obvious benefit in the structuring, in going along with the way
8 he wanted to structure these various transactions and
9 withdrawals and so forth because you got money from doing that.

10 MS. ELLSWORTH: But the benefit needs to be more than
11 just receiving money. The Weinstein companies received money.
12 The benefit needs to be benefit from participating in a sex
13 trafficking venture. That's the *Salesforce* case, that's the
14 Eleventh Circuit *Red Roof Inn* case. The benefit needs to be
15 tied to the participation in the venture.

16 And the participation needs to be overt acts that are
17 sort of participating in something together. The venture as
18 referred to by the plaintiffs in their complaint is a sex
19 trafficking venture, and so what the plaintiffs need to have
20 pled and what they have not pled, is that there was in fact a
21 meeting of the minds between JPMorgan Chase and Epstein to
22 participate in a sex trafficking venture. There's nothing in
23 the complaint that would allow that conclusion to be drawn.

24 THE COURT: Let me, again, with apologies, shift
25 gears.

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1 You make the argument that a plaintiff here doesn't
2 count as a victim of obstruction under 18 U.S.C. Section
3 1595(a) because the victim was the government. But why isn't
4 the effect of obstructing a government investigation into
5 sexual assaults or whatever also something that victimizes the
6 persons who suffer from the assaults?

7 MS. ELLSWORTH: So, your Honor, I guess I would have
8 two responses to that. The first is the *Doe* case that we cite
9 in our brief holds that in fact there is no private right of
10 action under the TVPA's obstruction clause because the victim
11 is the government. Even putting that to the side, there's no
12 allegation of an ongoing investigation that JPMorgan was aware
13 of and that these actions alleged in the complaint would have
14 obstructed. So the time period that we are talking about here
15 is a time period during which there's no at least publicly
16 known federal investigation. There's no allegations of any
17 attempts by JPMorgan to obstruct anything like that.

18 There is one allegation in the complaint -- or maybe
19 it's in the motion to dismiss briefing -- about responding to a
20 subpoena. As we said in our reply brief, it was the product of
21 a motion that was granted by default against JPMorgan. So I
22 don't think there's any facts that get to the obstruction,
23 putting aside the fact of a private right of action or whether
24 the victim is somebody like Jane Doe or is in fact the
25 government.

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1 Just briefly on a few of the other TVPA claims that
2 plaintiff has attempted to bring, aiding and abetting, the
3 *Noble* case, again, Judge Sweet says there's no aiding and
4 abetting liability under the TVPA, because it's to be covered
5 by the secondary liability provision. Conspiracy and attempt,
6 those were --

7 THE COURT: For me to remain, as I always will, in the
8 law of Judge Sweet, who was still actively hearing cases in
9 this court when he was in his mid to late 90s -- and then went
10 off, I think he was 97 or so, for his usual winter skiing trip
11 to Lake Tahoe, skied all day and then did not wake up that
12 evening -- if you got to go, that's the way to go -- but go
13 ahead, that was just unfortunate, but something I couldn't help
14 myself from mentioning.

15 MS. ELLSWORTH: Understood, your Honor. Understood.

16 The attempt and conspiracy claims of the TVPA, those
17 are not added until January of this year. Many courts have
18 held that additional liability amendments to the TVPA that
19 provide additional liability are not retroactive. These do
20 expand the scope of liability substantially, and of course are
21 not themselves retroactive, so those claims are barred. They
22 don't apply. The statute didn't allow it.

23 The last point I would make, your Honor, on the common
24 law claims, I talked a little about the negligence and the
25 duty, I think your Honor correctly pointed out in the prior

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1 argument that for intentional affliction of emotional distress,
2 and I would say for the aiding and abetting battery claim, an
3 overt act is required, more than what is alleged in the
4 complaint here, in addition to all the other failings,
5 including particular causation.

6 THE COURT: Where do we stand?

7 You have a full minute. I have run out of questions.

8 MS. ELLSWORTH: I can keep going, your Honor.

9 THE COURT: Yes, please.

10 MS. ELLSWORTH: I also wanted to make the point that
11 in the TVPA context, in particular, the requirement is -- and
12 again, this comes from the Eleventh Circuit in the *Red Roof Inn*
13 case, as well as other cases, the knowledge needs to be of a
14 particular violation, a single violation of the statute for
15 this 1595(a) participation civil liability. So there needs to
16 be an allegation that, in fact, as to this plaintiff there was
17 knowledge by JPMorgan of her trafficking. And again, there are
18 no such allegations.

19 THE COURT: I'm not quite sure what the reasoning is
20 to that argument. If, hypothetically, I know trafficking is
21 going on, I intentionally participate and facilitate it, I've
22 got to know exactly who is the victim?

23 MS. ELLSWORTH: You do, your Honor.

24 THE COURT: Why?

25 MS. ELLSWORTH: Because the way the statute works for

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1 the secondary liability is it sweeps back into 1591, which
2 requires an actual violation of the trafficking statute. So in
3 order to be liable for -- under secondary liability -- in
4 addition to knowledge, participation and benefit, that
5 knowledge needs to be a violation of the underlying statute.
6 And that violation of the underlying statute needs to be as to
7 a particular individual.

8 You don't necessarily need to know that individual's
9 name, but, for example, in the hotel cases, which are the TVPA
10 cases, typically, when these cases are brought, sometimes
11 they're brought against franchisees and sometimes against
12 franchisors. The franchisees were people on the ground who
13 might see a victim, hear cries for help, et cetera. Most of
14 the cases find that allegations that are sufficiently well
15 pleaded as to those defendants, can proceed forward. But
16 allegations against franchisors, like Marriott or a Wyndham
17 hotel where the allegations simply are that there was sex
18 trafficking going on in one of their franchise hotels, those
19 are held to be insufficient under the TVPA because there's no,
20 among other things, specific knowledge of a specific violation
21 of the statute.

22 THE COURT: All right. I hear you. It still sounds a
23 little strange to me, but okay, I need to look more at those
24 cases. So let me hear from your adversary.

25 MS. ELLSWORTH: Thank you, your Honor.

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1 MR. BOIES: May it please the Court.

2 Let me just try to clear up what the complaint
3 alleges. The complaint does allege that they had specific
4 knowledge of the trafficking, for example, of the plaintiff,
5 the named plaintiff here. That's in, for example,
6 paragraphs 107 and 115 of the complaint. In paragraphs 227 and
7 226 of the complaint, we also lay out what top executives of
8 JPMorgan knew about, knew personally about, in terms of the sex
9 trafficking.

10 This is not a case like the *Noble* case, your Honor.
11 And I have the privilege and Ms. McCawley as well, had the
12 privilege of trying one of the last cases in front of Judge
13 Sweet, which was a case in which we represented sex trafficking
14 victims. And what Judge Sweet ruled in the *Noble* case is that
15 with respect to Weinstein, there was no proof that he knew
16 about the illegal activity going on. Here, we have proof in
17 paragraphs 226, 227, 107, 115 --

18 THE COURT: If those are fairly short paragraphs, can
19 you read them to me.

20 MR. BOIES: Sure.

21 In 107, "There came a time when Epstein forced Jane
22 Doe to give massages to his powerful friends. During some of
23 these massages, Jane Doe was sexually abused by force and
24 against her will by Epstein's friends, by whom she had been
25 required to do massage. At least one of Epstein's friends used

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1 aggressive force in his sexual assault of her and informed Jane
2 Doe 1 that he had Epstein's permission to do what he wanted to
3 her. Out of fear, Jane Doe has still not named this powerful
4 executive publicly." Thereafter, in this case, that powerful
5 executive was identified as Jes Staley.

6 THE COURT: All right. So there were other things you
7 wanted to --

8 MR. BOIES: There were other ones. And the other
9 gives comparable information.

10 But more important, your Honor, there is no
11 requirement that the defendant know the name or the identity of
12 the individual. If you know that there's sex trafficking going
13 on, if you rent a room for people to engage in sex trafficking
14 and you profit from that, there is no requirement that you take
15 names at the door, that you see the people going in, that you
16 even know how many people go in. If you know that the sex
17 trafficking is going on there, it is sufficient. And there's
18 no case to the contrary.

19 The *Choice Hotel* situation, your Honor, is a situation
20 in which the franchisor was not held liable because the
21 franchisor didn't know that there was sex trafficking going on
22 in the individual hotels. But the franchisee, the owner of the
23 hotel, was held liable. And there was nothing in there that
24 suggested the franchisee had to know the name of every person
25 who came in and out and who was subject to the sex trafficking.

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1 THE COURT: Let me segue from that to a different
2 question, which was sort of quickly alluded to, but I want to
3 focus on it a little bit more, which is the statute of
4 limitations.

5 Does that require proof or allegations that your
6 plaintiff, Jane Doe, was abused within the limitations period,
7 or is it sufficient to simply say -- as I'm sure the complaint
8 does, if I recall correctly -- that the sex trafficking
9 venture, so to speak, continued beyond the cutoff of the
10 statute of limitations?

11 MR. BOIES: I think it was -- because of our
12 conspiracy allegation -- I think it is sufficient that the sex
13 trafficking continued on. We do allege that Jane Doe was
14 trafficked and abused in 2013. And whatever ambiguity there
15 might have been about that prior to the time that she was
16 deposed -- and she's already been deposed in this case -- her
17 deposition made clear that she continued to be trafficked into
18 2013. So the allegation --

19 THE COURT: I don't think I can consider that on this
20 motion.

21 MR. BOIES: No, no. But all I'm saying --

22 THE COURT: It might be a basis for leave to amend,
23 but that would be --

24 MR. BOIES: And all I'm saying, your Honor, is our
25 complaint alleges it goes into 2013.

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1 THE COURT: You're saying it's been confirmed.

2 MR. BOIES: I'm just saying it's been confirmed. They
3 raise some doubt in their papers as to whether our allegations
4 have it or not.

5 THE COURT: Okay.

6 MR. BOIES: We do allege it as 2013 in the complaint.

7 And in addition to that, we also allege, because they
8 were participating in a conspiracy and they never withdrew from
9 that conspiracy, at least until 2019, they continue to be
10 liable for acts of that conspiracy even if they are not
11 continuing to take affirmative actions themselves.

12 THE COURT: What about -- again, if I can, with
13 apologies, shift gears -- what about the issues I was
14 questioning your adversary about aiding and abetting?

15 MR. BOIES: With respect to aiding and abetting, your
16 Honor, we think all of the three requirements of aiding and
17 abetting are met here. There's knowledge of the underlying --

18 THE COURT: No, the question was a more, if you will,
19 picky question about if the statute for this only applies to
20 this chapter, how do you get aiding and abetting, which is not
21 part of this chapter.

22 MR. BOIES: Well, I think there's an argument, your
23 Honor, that aiding and abetting is part of the chapter in the
24 following sense: 18 Section 2, which makes aiding and
25 abetting -- what Section 2 says there is that if you aid and

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1 abet, you are liable as a principal. And as the Court is
2 aware, when people are indicted for aiding and abetting in
3 1591, the indictment begins with 1591, and so what they're
4 being charged with is a violation of 1591. Aiding and abetting
5 simply makes them a principal under 1591.

6 THE COURT: I guess -- and I don't want to dwell on
7 this -- Section 2, a criminal statute, on its face applies to
8 the entirety of Title 18. But by contrast, in the civil
9 context, the cause of action is limited to a victim of this
10 chapter. And the question, therefore, is: Does that then not
11 import Section 2?

12 MR. BOIES: It's almost metaphysical. I guess it
13 really just depends on sort of how you look at it. They're
14 being charged with violating 1591. And what Section 2 says is
15 you violate 1591 where you are a principal or as a principal,
16 whether you are the principal or whether you are an aider and
17 abetter, and I --

18 THE COURT: Okay. I understand the argument.

19 MR. BOIES: The other thing, your Honor, is that with
20 respect to -- your Honor raised the question about *Rothstein*.
21 And *Rothstein*, of course, related to Section 2333. And the
22 language in 1591, 1595 is broader than 2333 at the time that
23 *Rothstein* was decided.

24 Now, after *Rothstein* was decided, Congress amended
25 2333 to in effect reverse *Rothstein*. And I think that the

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1 Court can take into account here, in interpreting 1591, that
2 congressional expression, it was clear that Congress thought
3 the court got it wrong in interpreting 2333.

4 THE COURT: Well, I don't know if I can read it that
5 way. I mean, I agree with you that *Rothstein* is distinctual.
6 But whether I can infer more than that from Congress --
7 Congress can reverse a ruling without necessarily saying we
8 think the court got it wrong. They can reverse a ruling
9 because they want to make sure that in the future the statute
10 will cover those kinds of things.

11 MR. BOIES: I think the Court is correct. It's very
12 hard to interpret.

13 THE COURT: What about this issue -- again, this is a
14 little bit metaphysical -- what about the question of whether
15 obstruction of a government investigation gives rise to a claim
16 under the statute for someone who was the victim of what was
17 being covered up or obstructed from the investigation?

18 MR. BOIES: I think, again, that's a difficult
19 question because the question, I think, is, were you damaged by
20 the obstruction. And if the obstruction comes after you have
21 suffered your damage, you may not have that -- I think that if
22 you go back to the early -- and this may be a problem with any
23 class action or maybe you have to have certain classes -- but I
24 think that if you really think about it, the obstruction harms
25 the people that come after the obstruction. And I think it's a

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2 complicated --

3 (Continued on next page)

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1 THE COURT: I'll have to think about it. I'm not sure
2 how I think about that.

3 Let me ask my law clerk how we are doing time-wise.
4 You've got three minutes. You've got an eternity.

5 MR. BOIES: Let me say one thing. This was not a team
6 banking activity. They were structuring. There were dozens
7 and dozens of \$7,500 withdrawals all in cash all at the same
8 time. They were not filing the suspicious activity report.
9 They were taking the plans from a Highbridge. And there may be
10 some doubt about exactly what a Highbridge's ownership was but
11 there's no doubt that high bridge was controlled by the
12 defendant here. And they were using the Highbridge planes to
13 transport girls. Jeff daily was himself participating in the
14 sexual abuse, in the sex trafficking and witnessing it. There
15 can't be any doubt that what JP Morgan Chase did here was
16 nothing like routine banking services. There's nothing like
17 the kind of situation where somebody provides a neutral
18 product, neutral service without any knowledge about how it's
19 being used.

20 Here, they were actually structuring what they were
21 doing in order to make sex trafficking possible. The complaint
22 alleges and the proof will clearly show that this sex
23 trafficking could not have gone on the way it did without the
24 financial support of an institution like J.P. Morgan and they
25 knew that at the time and they were profiting at the time. And

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1 when people -- and this is alleged in the complaint and it'll
2 be proven if we get a chance do it at trial. When people at
3 the bank went to the high-level people and said we're
4 supporting the sex trafficker and we ought to stop, the top
5 management because they wanted to keep those fees and keep what
6 was going on, said no. We're going to continue to do that.

7 So, this was a situation which they had complete
8 knowledge and they were not -- and it is not a situation which
9 is no overt act. This is not a situation like the Cornell case
10 where the Court in effect says there's no overt act that is
11 done. Here, there were overt acts with Highbridge. There were
12 overt acts with structuring. There were overt acts with not
13 complying with the responsibility to file the suspicious
14 activity reports and there were overt acts which the top
15 executives, JPMorgan Chase participated personally in the sex
16 trafficking. So, this is a situation that is unlike any of the
17 cases that they cite and clearly fits the mold of what 1595 was
18 trying do. And it is both a criminal and civil statute.

19 The one thing that is clear in terms of construction
20 is that when you are thinking about the scope of civil remedy
21 for the violation, that is certainly remedial and that is
22 certainly where it ought to be given its broad stroke. what
23 they're trying to say, yes, there may have been a violation but
24 you ought to shrink down the remedies that you ought to limit
25 remedies. you ought to impose all of these special

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1 requirements on who is able to receive the remedy. That's
2 where the broad construction of this remedial statute is
3 because what you have -- no doubt that there was sex
4 trafficking here.

5 There is no doubt that what J.P. Morgan did made that
6 possible. There's no doubt that they knew what they were doing
7 at the time. we got a lot of causes of action here, and some
8 of them are overlapping. And by the time we get to trial we
9 are going to have to probably pare it down, but none of that
10 affects discovery. All these causes of action, I think we met
11 the legal requirements to get to the story stage and decide
12 after that how we ultimately try the case.

13 THE COURT: All right. Now, we have reached the time.

14 MR. BOIES: Thank you very much, your Honor.

15 THE COURT: Let me hear your adversary.

16 MS. ELLSWORTH: Your Honor, Paragraph 107 of the
17 complaint that Mr. Boies just recited to you, the conduct
18 alleged in that paragraph is abhorrent but it is not sex
19 trafficking. It is sexual assault. And the Trafficking
20 Victims Protection Act is not a federal sexual assault statute.
21 It has to do with trafficking. It has very specific
22 definitions.

23 The other paragraphs that Mr. Boies cited to you, they
24 also do not contain allegations that Mr. Staley witnessed
25 trafficking. They contain allegations that Mr. Staley

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1 witnessed abuse, that he participated in abuse or assault.

2 That is different than trafficking.

3 On the suggestion that there's an allegation or that
4 there is evidence of Highbridge, which is not a subsidiary in
5 the corporate form, is more complicate than that. But in any
6 event, there is a single, unadorned by factual --

7 THE COURT: Just going back to your point for a
8 minute, I'm looking at 1591 is what we're talking about, yes?

9 MS. ELLSWORTH: Correct. That is the underlying
10 conduct, yes.

11 THE COURT: Whoever knowingly recruits, entices,
12 harbors, transports, provides, obtains, advertises, maintains,
13 patronizes or solicits by any means, a person or who benefits
14 financially or by receiving anything of value from
15 participation in a venture which has been engaged in an act
16 described in violation of Paragraph One, commits a crime -- I'm
17 leaving some important language out but why do you say -- I
18 don't have the complaint in front of me, but why do you say it
19 doesn't fit that?

20 MS. ELLSWORTH: For the secondary liability in 1595(A)
21 there needs to be a showing that there is trafficking in the
22 form of a commercial sex act, procured by force, fraud or
23 coercion or for an individual under the age of 18 which is not
24 a plaintiff in this case. The plaintiff in case was not under
25 the age of 18 at the time that she became involved with

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1 Epstein.

2 So, the requirement is that the victim be forced to
3 engage in commercial sex acts by force, fraud or coercion.

4 THE COURT: So, I should read a little further after
5 the portion I just read.

6 Knowing or except where the act constituting the
7 violation of Paragraph One is advertising in reckless disregard
8 of the fact. That means a forced threat of forced fraud or
9 coercion described in Subsection (E) (2) or any combination of
10 such means will be used to cause the person to engage in a
11 commercial sex act or that the person has not attained the age
12 of 18 years and will be caused to engage in a commercial sex
13 act shall be punished, et cetera.

14 So, why isn't it reckless disregard?

15 MS. ELLSWORTH: Well, again, there's no evidence pled
16 as against the paragraphs of the complaint that Mr. Boies
17 pointed to are the allegations as to Mr. Staley's conduct.
18 There are no allegations that Mr. Staley was aware of
19 commercial sex acts at all and was aware of any force, fraud or
20 coercion being used to cause, again, the plaintiff in this case
21 to engage in commercial sex act. There's no allegation of
22 money exchanging hands as to the allegation in Paragraph 107
23 and the other paragraph --

24 THE COURT: I'll have to take a closer look at those
25 paragraphs.

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1 MS. ELLSWORTH: We don't think that knowledge should
2 be excluded. But even to the extent it's not knowledge of
3 trafficking and that's an important distinction.

4 THE COURT: Okay.

5 MS. ELLSWORTH: Allegations as to Highbridge, there is
6 no factual support for it at all in the complaint. It is in
7 Paragraph 170 and it is a legal conclusion. It says that the
8 Highbridge plane was used to traffic women. That's it. I'm
9 paraphrasing but that's the language. That's insufficient.

10 On the statute of limitations, I would just point out
11 to the Court that this plaintiff filed a prior case in which
12 alleged the trafficking ended in 2012. She alleged that her
13 interactions with Epstein ended in 2012.

14 THE COURT: Given what's alleged here and given what
15 according to your adversary might be a basis to amend if an
16 amendment was necessary, isn't that ultimately a jury question?

17 MS. ELLSWORTH: It may be, your Honor. But it is an
18 inconsistent pleading filed by the same lawyers.

19 THE COURT: Wait. Wait a minute. An inconsistent
20 pleading by the same lawyers?

21 MS. ELLSWORTH: It is.

22 THE COURT: Is that a capital offense?

23 MS. ELLSWORTH: It's an allegation signed to Rule 11
24 is that the conduct ended in 2012. It's important. The ten
25 years statute of limitation.

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1 THE COURT: All right.

2 MS. ELLSWORTH: The idea that, again, Mr. Boies
3 finished his argument by noting that Epstein's conduct was made
4 possible by the financing or the fact that J.P. Morgan served
5 as a bank for Epstein, I think that is belied by the fact that
6 then Epstein would go to Deutsche Bank and the same conduct is
7 alleged by Deutsche Bank. So, the chain of causation is
8 broken, if not established by the complaint here. The fact
9 that this conduct was made possible by the fact that JP Morgan
10 having a bank account or bank accounts for Mr. Epstein.

11 The last point I would make again is aiding and
12 abetting. In addition to all of the reasons why it shouldn't
13 apply here, including the Noble case and Perlis case in the
14 Circuit of the District of Connecticut finding that aiding and
15 abetting is not common place.

16 Putting all of that to the side, aiding and abetting
17 also required a deliberate act of some sort and nothing like
18 that is pled in the complaint as to conduct of JP Morgan.

19 THE COURT: Okay. Well, I want to thank all counsel
20 for this excellent argument, which is very helpful to the
21 Court. It is possibly you may have heard I like to move my
22 cases along. I will get you at least a bottom-line ruling on
23 these motions and on the various prongs of these motions by the
24 end of this month. I hope to do better than that but I will at
25 least guaranty you that much so that we can move along with the

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2 case and you'll know at that point at least what is in
3 discovery and what is not in discovery.

4 Anything else that anyone needs to raise with the
5 Court?

6 MR. BOIES: Not for the plaintiffs, your Honor.

7 MR. DOWDEN: Nothing from Deutsche Bank, your Honor.

8 THE COURT: Very good. Thanks again.

9
10 (Adjourned)

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